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Recent Decisions: Constitutional Law--Elections--Equal Protection [*Williams v. Rhodes*, 393 U.S. 23 (1968)]

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CONSTITUTIONAL LAW — ELECTIONS — EQUAL PROTECTION

Williams v. Rhodes, 393 U.S. 23 (1968).

While traditionally two political parties have dominated American Presidential elections, there has frequently been a third-party candidate who, although never successful, has often provided color and dignity to an otherwise overbearing ritual. A primary reason for an independent party's lack of success has been its inability to comply with the rigid requirements of diverse state election laws. Usually, state statutes permit voters to write in a party or candidate's name only if that party or candidate has fulfilled certain conditions; moreover, in order to secure a printed position on the ballot, the same party or candidate must comply with more rigid statutory requirements. The recent effort of George Wallace to qualify for a printed ballot position in all 50 states precipitated a unique Supreme Court opinion. Ostensibly *Williams v. Rhodes*[1] dealt with the power of a state to limit access to the ballot in a Presidential election, yet the impact generated by the decision may be felt more in a state's attempt to delimit state and local candidacy.

In *Williams*, the Ohio American Independent Party (OAIP), joined by the Socialist Labor Party (SLP),[2] alleged that Ohio's election scheme effectively prohibited an independent Presidential candidate from gaining a place on the general election ballot in violation of the first and 14th amendments. Both appellants contended that the onerous conditions precedent to securing a printed ballot position were violative of the equal protection clause of the 14th amendment since they forced old and new political parties to comply with disproportionate conditions. Specifically, the Ohio law required a new political party to present a petition signed by qualified voters totaling 15 percent of the aggregate votes cast in the preceding gubernatorial election, while a party already positioned on the ballot was required to garner only 10 percent of the vote

[1] 393 U.S. 23 (1968).

[2] While procedurally the case involved two independent third party appellants, it was essential for the Court to merge the two actions in order to secure a complete adjudication of all basic issues. Since the Ohio American Party had obtained the required number of signatures, but had failed to file the petition before the prescribed filing date, it had standing only to challenge section 3513.263 of the *Ohio Revised Code*, which requires that a nominating petition be submitted 90 days before the election. However, the Socialist Labor Party, having failed to comply with either the signature or filing date requirement, had standing to raise the constitutionality of the signature requirement as well as the filing date requirement.

cast in the same election to preserve its position.[3] Conceding that the state had the constitutional authority to reasonably regulate a candidate's placement on the ballot, the independent parties asserted that the disparate classification violated their right to associate freely for the advancement of political belief, and conclusively deprived a qualified voter the right to effectively cast his ballot. Ohio maintained that article II section 1 of the United States Constitution expressly provided the state legislature with discretion to determine the manner in which Presidential electors are to be selected, and that if the 14th amendment did restrict the legislature's discretion, the challenged statutory classification was reasonable in light of such legitimate legislative objectives as promoting the two-party system and encouraging the election of candidates by a majority.[4] Read literally, article II section 1 gives the states absolute discretion to decide how Presidential electors shall be chosen.[5]

[3] OHIO REV. CODE ANN. § 3517.01 (Page 1960), which provides in part:

> A political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state at least ten percent of the entire vote cast for governor or which filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen percent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election.

In 1966, 2,887,331 votes were cast for Ohio gubernatorial candidates. 1968 OHIO ALMANAC 281 (1967). To hedge against the possibility that some signatures might be disqualified, the OAIP filed petitions supported by 450,000 signatures, well over the 15 percent needed.

[4] 393 U.S. at 31-32. Undoubtedly the exclusion of minority parties from the ballot can be justified by the fundamental policy frequently proffered by political scientists that a two-party system, in contrast to a multiparty system, is characteristic of the most sophisticated forms of political democracy, and is probably the only pattern within which democracy can effectively operate. *See* H. LASKI, A GRAMMER OF POLITICS 314 (2d ed. 1929); 1 A. LOWELL, THE GOVERNMENT OF ENGLAND 458 (3d ed. 1912). However, the claim that new political parties would seriously jeopardize our inveterate two-party system seems particularly conjectural in light of two hundred years of Anglo-American history amply demonstrating the uncanny ability of our political system to return always to the two-party system despite complete liberty of entry for new parties. Moreover, while the British Labor Party and the Republican Party in this country are living examples of successful third party movements, it is difficult to find any theoretical objection to such a result. *Cf.* 1 M. LERNER, AMERICA AS A CIVILIZATION 396 (1957).

The rationale offered by Ohio is also pretentious in assuming that the primary role of a minority party is to compete with the established political parties for the emoluments of political power. Traditionally, the role of the third party has been to engender new ideas which are assimilated and effectuated by the established political parties. W. BINKLEY, AMERICAN POLITICAL PARTIES 81 (1943). Today this contribution is essential since the established parties tend to be cross-sectional with only slight deviations in platform content. *See generally* D. TRUMAN, THE GOVERNMENTAL PROCESS 281 (1951).

[5] "Each State shall appoint, in such a Manner as the Legislature thereof may direct,

However, both the district court and the Supreme Court conceded that this apparent unrestricted grant of constitutional power[6] was limited by other provisions of the Constitution.

After conceding that the Ohio election scheme violated the equal protection clause, a majority of the three-judge district court[7] held that both appellants were only entitled to write-in space on the forthcoming ballot since their respective parties had been guilty of laches and since the Supreme Court had failed to pronounce a sufficient equity standard that would empower the district court to order the state to provide printed ballot space.[8] Believing the view of the majority to be myopic, the dissent maintained that the principles articulated in the reapportionment and desegregation cases compelled the court, acting in equity, to expressly place the OAIP on the ballot.[9]

On appeal, the Supreme Court faced the basic question of whether the express grant of constitutional power contained in article II was circumscribed by the command of the 14th amendment. In a 6-to-3 decision consisting of five separate opinions, all members of the Court agreed that the 14th amendment confined the legislature's discretionary power, but failed to agree as to whether Ohio's statutory scheme represented a misuse of such restricted discretion.

Writing for the majority,[10] Justice Black asserted that the express grant of power in article II section 1 "may not be exercised in a way that violates other specific provisions of the Constitution,"[11] and determined that the qualified voter's interest in casting a ballot for a person of his choice is subsumed in the right to vote and in the first amendment right to association.[12] The majority opinion,

a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." U.S. CONST. article II § 1. *But see* note 15 *infra* which suggests that the second sentence of section two of the 14th amendment provides an alternative remedy for state deprivation of voting rights.

[6] An interesting anomaly is presented by the concept that an article of the Constitution expressly gives the states power, particularly in light of the "reserved powers" clause in the 10th amendment.

[7] *See* 28 U.S.C. §§ 2281, 2284 (1964).

[8] Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968).

[9] *Id.* at 997 (dissenting opinion).

[10] Justices Brennan, Fortas, and Marshall were in complete concurrence with Justice Black's opinion. Justice Stewart joined them concurring in the disposition of the SLP's claim, but dissented from the disposition of the OAIP's claim.

[11] 393 U.S. at 29.

[12] Justice Black's position appears to be consistent with past opinions since the right to be protected in this case is not an expressed first amendment right but rather a right founded upon or ancillary to specific first amendment rights. Justice Black, like Justice

relying on cases involving first amendment rights indicates that when fundamental rights are involved, the state has the burden of showing a compelling interest[13] for any interference with the exercise of such highly protected rights. Since the interest of the individual voter is superior when balanced against the state's interest in promoting political stability, Justice Black concluded that the disproportionate treatment accorded old and new political parties in securing a printed ballot position amounted to "invidious discrimination."[14] Mr. Justice Harlan, concurring, adopted a similar balancing approach and found that since the discriminatory classi-

Douglas, has maintained that pure first amendment rights are absolute and that the state can never show an interest which would justify the inhibition of these fundamental rights. *See* Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting). In *Williams*, Justice Black finds that the two concepts underlying the right of a candidate to free ballot access are the right of free association and the right to vote. While Justice Black has indicated that freedom of association is an expressed absolute first amendment right, *see* United Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217 (1967), he clearly stated in Harper v. Virginia Bd. of Electors, 383 U.S. 663 (1966) (dissenting opinion), that: "There is no . . . specific constitutional provision absolutely barring the states from abridging the right to vote." *Id.* at 675 n.4. He concluded that the state could place restrictions on an *unqualified* voter provided it could show a *reasonable* basis for such restriction. In *Williams* Justice Black takes a further step in saying that the state is required to show a *compelling* reason for any interference with the rights of *qualified* voters. While both *Harper* and *Williams* are based on the equal protection clause, together they require the application of different standards of state justification depending upon whether the state is attempting to interfere with rights of a *qualified* or *unqualified* voter. Such a use of the equal protection clause, with its varying standard of the burden of proof placed upon the state, may be leaving to the trial judge the same excessive amount of discretion that Justice Black criticized when he castigated the *Harper* majority for its attempt to discover what rights were fundamentally fair. *See* Hetherington, *State Economic Regulation and Substative Due Process of Law*, 53 N.W.U.L. REV. 226 (1968). In the final analysis, since the *Williams* case concerns one right which Justice Black considers to be expressly protected by the first amendment and a second right which, while not expressly protected, is implicitly guaranteed by the Bill of Rights, he is compelled to adopt a balancing approach. However, included within the balance is a severe burden of proof which is placed upon the state. *See* note 14 *infra.*

[13] 393 U.S. at 31. Ohio contended that a state could validly promote the two-party system, and that appellants were not denied an opportunity to nominate a candidate of their choice since they could participate in the general elections and *vote against* the Democratic or Republican candidate. While not passing on the merits of the asserted state interest, Justice Black stated that Ohio's election system as constituted could not accomplish the alleged goals of the state since the candidates are identified only immediately before the election, thus providing the disaffected voters inadequate time to mobilize a campaign against such a candidate. *Id.* at 33.

[14] *Id.* at 34. Compare Justice Black's use of the term "invidious discrimination" with his language in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966):

> [S]tate laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." These vague and indefinite terms do not, of course, provide a precise formula or automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms . . . are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause, states are to have the broadest kind

fication created by the Ohio law was unreasonable in light of the alleged state objectives, the statutory scheme violated the due process clause.[15] Finally, Justice Douglas, acceding to the general analysis of the majority, maintained that the first amendment rights of voters are absolutely protected from any state interference.[16]

The two separate dissenting opinions focused on tangential issues, and failed to conclusively controvert the balancing approach utilized by the majority. After initially arguing that since, under article II section 1, a state legislature could exclusively select only Republican or Democratic electors, and was thus authorized to give the voters of the state the same restricted choice, Justice Stewart eventually adopted the balancing approach. However, he would uphold the Ohio election scheme since it did not rest on grounds wholly "irrelevant to the achievement of the State's objectives."[17] Chief Justice Warren, fearing the consequences of a hurried decision on such a weighty matter, would have dismissed the appeal on the ground that the extraordinary equity relief sought should only be granted upon a finding that the lower court's failure to grant the requested relief amounted to an abuse of discretion. More-

of leeway in areas where they have general constitutional competence to act. *Id.* at 673-74.

[15] Mr. Justice Harlan's concurrence is interesting in view of his stated position in the reapportionment cases. *See* Lucas v. Gen. Assembly of Colo., 377 U.S. 713 (1964); Davis v. Mann, 377 U.S. 678 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). As expressed in those cases Justice Harlan believes that section two of the 14th amendment was intended by the 39th Congress to permit a state to abridge a citizen's right to vote in any manner not prohibited by the 15th, 19th, or 24th amendments. Moreover, if a state does so abridge the right to vote, the exclusive remedy, as expressly provided in section two, is that the state's basis of representation in the House of Representatives, and in the Electoral College shall be reduced. While the majority of the Court failed to address themselves to Justice Harlan's interpretation, several articles have raised serious doubts as to the accuracy of his construction. *See generally* Van Alstyne, *The Fourteenth Amendment, The Right to Vote, and the Understanding of the Thirty-ninth Congress* in THE SUPREME COURT REVIEW 1965 at 33 (1965). *Cf.* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Franz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954). In *Williams*, Justice Harlan relies on the due process clause since the first amendment right to associate freely is involved, 393 U.S. at 41. *See generally* Justice Harlan's dissent in Carrington v. Rash, 380 U.S. 89, 97 (1965).

[16] Justice Douglas buttressed his position by referring to a prior pronouncement by Justice Black in Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting). 393 U.S. at 39-40. Thus, Justice Douglas would protect access to the ballot as part of the first amendment freedom of speech, a position he came close to adopting in Harper v. Virginia Bd. of Education, 383 U.S. 663 (1965). *But see* Justice Black's dissenting opinion. *Id.* at 775.

[17] 393 U.S. at 53. Justice Stewart criticizes the majority for its use of the stringent invidious discrimination standard, alleging that its utilization reflects an intense personal dislike for the motives of the state, rather than a true constitutional violation.

over, in view of the High Court's deference to the lower courts in the voting rights and reapportionment cases, there could be no finding that the district court abused its discretion in failing to order the candidates' names printed on the ballot.[18]

The existence of five separate opinions is deceptive. With the exception of Justice Douglas, eight members of the court acknowledged the proposition that a state may, upon proper justification, condition a candidate's access to the ballot. The majority and dissenting opinions principally differ over the quantum of justification a state should be obliged to show before legitimately interfering with the acknowledged interest of a qualified voter in having several candidates from which to select. Theorizing that the voter's interest is derived from first amendment rights, the majority would require the state to display compelling reasons for inhibiting such protected interest. Justices Harlan and Stewart, dubious of the analogy to expressed first amendment rights, would require a less stringent degree of justification by the state. The general proposition that the 14th amendment requires a state to demonstrate a compelling interest before conditioning a party's access to the ballot is significant because of the analytical and practical implications that it suggests.

Foremost, the *Williams* court conclusively deracinates the con-

[18] Chief Justice Warren raises several complex questions. The Court in the reapportionment cases deferred the shaping of remedies to the district courts, which, in turn, permitted the state legislatures to reach their own political solutions. Assuming for the moment that the rights to be protected are the same in this situation, the Court in the reapportionment cases always had several months before an election to facilitate political compromise. While Chief Justice Warren felt that both appellants had the opportunity to raise their objections earlier, and thus would deny relief, the majority, although never specifically addressing itself to this point, implied that the OAIP had acted in a timely fashion and thus was entitled to relief. Justice Black's opinion stresses that at the district court hearing, the State of Ohio admitted that it could still print new ballots before election day. *Id.* at 63-70.

The Chief Justice's opinion also assumes that the incidences of violation of the individual's right to vote are the same in the *Williams* case as they were in the reapportionment cases. *See generally* Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), where it is suggested that the courts should provide immediate relief when a state election scheme completely deprives an individual of his vote rather than merely diluting the weight of the vote. In appraising the question of whether a court should grant extraordinary relief upon the infringement of a citizen's right to vote, the Court has balanced the interest of the state against the effect of such an infringement on the individual's right to vote. As the degree of the infringement increases, the more compelling it becomes for a Court to grant the extraordinary remedy demanded. A total denial of the voting privilege, the most egregious type infringement of voting rights, would present the most immediate need for extraordinary relief. Recognizing that the state has an acknowledged interest in allowing minimal proportional representation among the state electorate, it can be argued that the *Williams* situation, where the states has only a slight interest, would demand more immediate relief than mere dilution of the relative weight of an individual's vote.

tention that the expressed grant of power in article II section 1 provided state legislatures unencumbered discretion in the selection of electors. While historically the Supreme Court eschewed passing on cases involving political rights,[19] a notable late 19th century exception suggested that the 14th and 15th amendments did constrain the state legislatures' article II section 1 power. In *McPherson v. Blacker*,[20] the Court rejected a contention that the Michigan legislature had effectively diluted the plaintiff's vote by conducting an election for Presidential electors on a district level, rather than on a state-wide basis. Without extended discussion, Justice Fuller asserted that though "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution", the Michigan law did not conflict with the 14th and 15th amendments.[21] Thus the Court's opinion in *Williams* affirms the historic belief that conceptually the 14th amendment delimits the power given to the states by article II section 1.

While the initial impact of the *Williams* case appears directed toward its effect upon future Presidential elections, a more significant implication is likely to be in what the decision portends for future state and municipal elections.[22] For two reasons it is doubtful that the Court's opinion will inspire any modifications in the

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[19] *See* Colgrove v. Green, 328 U.S. 549 (1946). In MacDougal v. Green, 335 U.S. 281 (1948), the constitutionality of the Illinois system of nominating candidates to represent new political parties was upheld by the majority of the Court; however, Justices Douglas and Black contended that the malapportioned election mechanism violated the equal protection clause. The landmark case of Baker v. Carr, 369 U.S. 186 (1962), recognized that malapportionment was not beyond the jurisdiction of the Court and finally ended the political question doctrine espoused in *Colgrove*. The most recent examination of the constitutionality of a state election scheme involving post-election procedure rather than ballot entrance requirements, also utilized the equal protection rationale. *See* Fortson v. Mooris, 385 U.S. 231 (1966).

[20] 146 U.S. 1 (1892). The *McPherson* Court boldly answered the charge that it should refrain from hearing the case since a political question was involved:

> The question of the validity of this act . . . is a judicial question and we cannot decline the exercise of our jurisdiction upon the inadmissable suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own. *Id.* at 24.

As to the constitutional status of electors elected under article II section 1, see Ray v. Blair, 343 U.S. 214 (1952); Burroughs v. United States, 290 U.S. 534 (1934); Hawke v. Smith, 253 U.S. 221 (1920); *In re* Green, 134 U.S. 377 (1890).

[21] 146 U.S. at 35. A close reading of Chief Justice Fuller's opinion indicates that he believed the conduct of the Michigan legislature had to be scrutinized by the standards set forth in the 14th and 15th amendments, but that in this instance, there had been no violation.

[22] The Chief Justice clearly indicated the full range of the majority's decision when he said, "[t]he rationale of the opinion of this Court, based both on the equal protection clause and the first amendment guarantee of freedom of association, will apply to all elections, national, state, and local." 393 U.S. at 63 (dissenting opinion).

states' Presidential election laws. First, the ballot access requirements of all other states for Presidential elections are less prohibitive than Ohio's. In striking down the statutory scheme both the majority and concurring opinions stress that the Ohio law requiring a new political party to obtain signatures of 15 percent of those who had voted in the last gubernatorial election was particularly unpalatable when compared with similar provisions in other states. Only five other states would go so far as to require petitions signed by as many as 5 percent of the voters from the last preceding general election, and in all such instances the filing date of the petition is much closer to election day.[23] Second, since both the form and existence of the electoral college are presently in doubt,[24] it is unlikely that state legislatures will undertake even minor alterations of present statutory schemes affecting Presidential elections. However, neither of these infirmities should inhibit effective reform of ballot access requirements as they pertain to state and municipal candidacy.

Since the equal protection clause standard articulated by the Court in *Williams* will apply to state and local election requirements, the decision prompts a reevaluation of such state laws in light of the principles set forth in the opinion. Under current law there is no established federal right entitling one to vote or to be a candidate in a state or local election, but all states provide for both privileges.[25] While conceptually the right to vote and the right

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[23] *See Id.* at 47 n.9.

[24] *See* Feerick, *The Electorial College — Why it Ought to be Abolished*, 37 FORDHAM L. REV. 1 (1968); Rosenthal, *Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1 (1968); Spering, *How To Make the Electoral College Constitutionally Representative*, 54 A.B.A.J. 763 (1968); Thorton, *Analysis of Electoral College Reform*, 39 OKLA. B.A.J. 351 (1968). The official text of the proposed constitutional amendment, providing for the direct election of the President, may not disturb the *Williams* holding, since section 4 states:

> The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations. The Congress shall prescribe by law, the time, place and manner in which the results of such elections shall be ascertained and declared. (Approved by House Judiciary Committee, April 29, 1969). *See* N.Y. Times, Apr. 30, 1969, at 21, col. 3 (city ed).

As long as Congress fails to act, the principle enunciated by *Williams* will apply to limit the states' authority to condition access to the Presidential ballot. Moreover, if Congress does exercise its power granted in section four of the proposed amendment, it is likely that the due process clause of the fifth amendment will inhibit Congressional discretion in much the same manner as the 14th amendment now confines the states' authority to limit ballot access.

[25] In Snowden v. Hughes, 321 U.S. 1 (1944), the Court stated that "[t]he right to become a candidate for state office, like the right to vote for the election of state of-

to be a candidate appear distinct,[26] the rationale of the Court in *Williams* and in the reapportionment cases indicates that candidacy is part of the right of a qualified voter to have his vote obtain equal marginal impact along with other votes in a given election. As expressed by Chief Justice Warren in *Reynolds v. Sims*:[27] "The right to vote freely for the candidate of one's choice is the essence of a democratic society and any restrictions on that right strikes at the heart of representative government."[28]

Williams v. Rhodes indicates that a state's power to establish ballot access requirements for third-party candidates is more encumbered than previously recognized, and that any such requirements must comport with the strictures embodied in the 14th amendment. In the future when a given state election requirement is challenged, a court will be compelled to evaluate the complete election scheme, balancing the qualified voter's interest in having his vote obtain equal marginal impact against the state's alleged justification for inhibitions placed on ballot access. The *Williams* Court acknowledged that the state has certain undefined interests which may justify placing reasonable limits on the entry of a new political party into the formal election process. Examination of existing state statutes regulating access to the ballot in state and local elections reveals a general pattern of similar restrictions which may or may not be justified by state interests under the mandate of *Williams*. However, before attempting to define the scope of these legitimate state concerns, the pattern of state statutory regulation must be explored more fully.

Structurally, requirements for ballot access in state-wide elections differ from similar provisions regulating the selection of Pres-

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ficers . . . is a right or privilege of state citizenship not of national citizenship which alone is protected by the privileges and immunities clause." *Id.* at 7. The Court's activity since Baker v. Carr, 369 U.S. 186 (1962), evidences an attempt to protect election activity from discriminatory or arbitrary denial by the state of the right to vote and consequently renders the language of *Snowden* suspect.

[26] State courts have been vigilant in preserving the right of citizens to vote. *See* Holliday v. O'Leary, 43 Mont. 157, 115 P. 204 (1911) (declaring violative of the state constitution a state statute which allowed nomination only by petition containing signatures equal to 5 percent of the total vote cast in the last general election); Rangan v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909) (statute requiring a specified number of signatures for a nominating petition declared unconstitutional); Morris v. Minns, 224 S.W. 587 (Tex. Civ. App. 1920). For two relatively recent cases which clearly articulate that the right to nominate and vote for the candidate of one's choice is a natural collary of the right to vote see Lasseigne v. Martin, 202 So. 2d 250 (La. Ct. App. 1967); Moore v. Walsh, 286 N.Y. 552, 37 N.E. 2d 555 (1941).

[27] 377 U.S. 533 (1964).

[28] *Id.* at 565; *cf.* Carrington v. Rash, 380 U.S. 89 (1965).

idential electors. Generally, a place on the state's general election ballot is automatically accorded to a political party as defined by the respective state law. Lacking such designation, a political organization's most common alternative means for obtaining a position on the ballot is the nominating petition. Forty-three states allow candidates to qualify by direct nominating petition.[29] Since this procedure is often the exclusive method by which an independent candidate can gain a ballot position, conditions placed upon the utilization of this device must be scrutinized. In general, there are four conditions placed upon ballot access via the nominating petition: a requirement as to the number of signatures; a requirement as to the apportionment of such signatures among counties within the state; a requirement that the signatures be authenticated; and a requirement that the petition be filed within a specified period.

Forty-three states, theorizing that every prospective candidate should be compelled to demonstrate some electorate support, require that the independent nominating petition be signed by a specified number of voters, or a specified percentage of voters.[30]

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[29] *See* note 30 *infra.*

[30] INDEPENDENT NOMINATING PETITION SIGNATURE REQUIREMENTS BY STATE

I. No Independent Nominating Petition
- Delaware
- Florida
- Louisiana
- Michigan
- New Mexico
- Washington

II. *States with Independent Nominating Petition Provisions Requiring Signatures Based on Either a Certain Percentage of Votes or Voters at a Particular Election, or Based on an Absolute Number of Signatures*

	Percent
A. States Requiring a Certain Percentage of:	
1. Registered Voters:	
GA. CODE ANN. § 34-1010(b) (Cum. Supp. 1968)	5
2. Votes Cast in the Last General Election:	
CAL. ELEC. CODE § 6831 (West 1961)	5
W. VA. CODE ANN. § 3-5-23 (1966)	1
3. Votes Cast in the Next General Election:	
MO. ANN. STAT. § 120.160(1) (1966)	1
4. Votes Cast in Last Election for:	
a. Governor:	
N.C. GEN. STAT. § 163-122(1) (Cum. Supp. 1967)	25
ARK. STAT. ANN. § 3-837 (Cum. Supp. 1967)	15
KAN. STAT. ANN. § 25-302(a) (Cum. Supp. 1968)	5
MASS. ANN. LAWS ch. 53 § 6 (Cum. Supp. 1968)	3
S.D. CODE § 16.0501 (1939)	2
ARIZ. REV. STAT. ANN. § 16-202 (1956)	2
ME. REV. STAT. ANN. tit. 21 § 429(5) (1949)	1
TEX. ELEC. CODE art. 13.50 (1966)	1
VT. STAT. ANN. tit. 17 § 572 (1959)	1

Although Justice Black implies that requiring more than 1 percent of the registered voters to sign a petition for a Presidential candidate would be unreasonable, a 3 percent requirement for state-wide elections would hardly proscribe ballot access to any political group. Applying such a standard, the laws of two states are clearly unreasonable,[31] while the requirements of five other states are suspect.[32]

In an attempt to abate sectional political movements, five states require that either the petition signatures come from a designated

b. Secretary of State:	
IND. ANN. STAT. § 29-3801 (1949)	0.5
c. Any Successful State-Wide Candidate:	
PA. STAT. ANN. tit. 25, § 2911b (1963)	0.5
d. Successful Candidate for the Same Office:	
MONT. REV. CODES ANN. § 23-804 (1967)	5
CONN. GEN. STAT. § 9-453 (1967)	0.5
e. Representative for Congress:	
NEV. REV. STAT. § 293.200 (1967)	5
ORE. REV. STAT. § 294.740 (1968)	3
B. States Requiring An Absolute Number of Signatures:	Number
ILL. ANN. STAT. ch. 46, § 10-2 (Smith-Hurd 1965)	25,000
N.D. CODE ANN. § 16-04-20 (Cum. Supp. 1967)	15,000
N.Y. ELEC. LAW § 138(5)(a) (McKinney 1965)	12,000
MISS. CODE ANN. § 3260(a) (Cum. Supp. 1966)	10,000
S.C. CODE ANN. § 23-400.16 (Cum. Supp. 1968)	10,000
MD. CODE ANN. art. 33, § 67(b) (1967)	5,000
OKLA. STAT. ANN. tit. 26, § 229 (1955)	5,000
IDAHO CODE ANN. § 34-612C (Cum. Supp. 1967)	3,000
WIS. STAT. ANN. § 8.20(4)(a) (1967)	3,000
MINN. STAT. ANN. § 202.09(a) (1962)	2,000
ALASKA STAT. § 15.25.160 (1962)	1,000
IOWA CODE ANN. § 45.1 (1949)	1,000
KY. REV. STAT. ANN. § 118.080(2) (Cum. Supp. 1968)	1,000
NEB. REV. STAT. § 32-504(c) (1968)	1,000
N.H. REV. STAT. ANN. § 56-67 (1955)	1,000
N.J. STAT. ANN. § 19:3-15 (1964)	800
R.I. GEN. LAWS ANN. § 17-16-1 (Cum. Supp. 1967)	500
ALA. CODE tit. 17, 145 (1959)	300
COLO. REV. STAT. ANN. § 49-7-1(3) (1964)	300
UTAH CODE ANN. § 20-3-2(2) (Supp. 1969)	500
VA. CODE ANN. § 24-133 (1969)	250
WYO. STAT. ANN. § 22-118.11 (Cum. Supp. 1967)	100
HAWAII REV. LAWS § 11-94 (Supp. 1965)	25
TENN. CODE ANN. § 2-1206 (Cum. Supp. 1968)	25

[31] *See* ARK. STAT. ANN. § 3-837 (Cum. Supp. 1967); N.C. GEN. STAT. 163-96 (Cum. Supp. 1967). None of the states with an expressed numerical requirement would compel signatures from more than 5 percent of the registered voters of the respective states.

[32] *See* CAL. ELECT. CODE § 6831 (West 1961) (5 percent); GA. CODE ANN. § 34-1010 (Cum. Supp. 1968) (5 percent); KAN. STAT. ANN. § 25-302(a) (Cum. Supp. 1968) (5 percent); MONT. REV. CODES ANN. § 23-909 (1967) (3 percent); NEV. REV. STAT. § 293.200 (1967) (5 percent).

number of counties or that no more than a given number of signatures be obtained from any one county.[33] This requirement would not inhibit a genuine state-wide third party;[34] however, as the urban-rural population disparity grows more pronounced, such a standard would restrict a cohesive metropolitan political effort to establish political and thus fiscal independence.[35]

All states that allow nominating petitions require that the signatures be authenticated. While most states require only that the circulator of the petition believe the signatures to be of qualified voters, three states demand that each signature be individually notarized,[36] and three other states require that the circulator witness all the petition signatures.[37] The reasonableness of the latter requirement is highly suspect, particularly when the signatures required number in the thousands.

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[33] *See* IDAHO CODE ANN. § 34-612(c) (Cum. Supp. 1967); ILL. ANN. STAT. ch. 46, § 10-3 (Smith-Hurd 1965); MASS. ANN. LAWS ch. 53, § 6 (1958); MICH. COMP. LAWS § 168.685 (1967); N.Y. ELEC. § 138 (McKinney 1964).

[34] Using the number of votes cast in the 1968 Presidential election, the apportionment requirements of these five states will, with one possible exception, probably not cause extreme hardship. IDAHO CODE ANN. § 34-612 (Cum. Supp. 1967), demands that 150 signatures come from each county; however, the smallest county, Camas, cast only 482 votes in 1968. 1969 WORLD ALAMANAC 892 (1968). The requirement that a fixed number of signatures be procured from each county becomes more onerous as the size of the various counties in vote population decreases.

[35]

STATE	APPORTIONMENT REQUIREMENT*	PERCENTAGE OF SIGNATURES PERMITTED FROM ONE COUNTY*	COUNTY	PORTION OF TOTAL STATE VOTE IN 1968**	PERCENT OF TOTAL VOTE
Massachusetts	No more than 1/3 from any one county	33 1/3%	Middlesex	549,681 of 2,306,691	23%
Michigan	100 signatures from at least 10 counties.	35%	Wayne	1,022,125 of 3,218,403	34%

* For the statutes setting out the above requirements, see note 34 *supra.*

** 1969 WORLD ALMANAC 897 (Massachusetts), 898 (Michigan) (1968).

[36] COLO. REV. STAT. ANN. § 49-7-1(4); UTAH CODE ANN. § 20-3-2(g)(2) (1969); VA. CODE ANN. § 24-133 (1964).

[37] The North Carolina statute requires that 25 percent of votes cast in the preceding gubernatorial election be witnessed personally by circulator. This requirement takes on added significance in light of the 1,558,307 votes cast in North Carolina's 1968 gubernatorial election. 1969 WORLD ALMANAC. N.C. GEN. STAT. § 163-22 (1963). Maryland requires 5,000 signatures be witnessed by the circulator. MD. ANN. CODE art. 33, § 54 (1957). New Jersey is the least offensive by requiring that 2 percent of those who voted in the last general election must sign the petition, and that the circulator must witness such signatures. N.J. STAT. ANN. § 19: 1-1 (1962). Section

Finally, in an attempt to provide ample time to print ballots and to verify each candidate's credentials, state election laws require that the nominating petitions be filed before a particular date. An independent candidate would prefer a late deadline in order to capitalize on the interest generated by the collection of signatures. Since it would appear that a July or August deadline for a November election would accommodate both interests, the requirements of seven states demanding that petitions be filed before July are of questionable validity.[38]

Although the factual setting which precipitated the *Williams* decision is unique, the principles contained in the opinion are of particular significance from both a historical and contemporary view point. The *Williams* Court categorically rejects the questionable historical theory that the state legislative power to select Presidential electors is unfettered by the 14th amendment. The significance of the Court's approach is diminished somewhat by the fact that only in this limited situation does the Constitution make an express grant of power to the states of such magnitude, and, even given the principle's application to such a circumstance, the electoral college system itself is presently undergoing scrutiny.[39] However, the rationale of the Court is extremely significant in two other aspects. Foremost, the limits recognized by the Court on the power of a government to restrict printed ballot access apply directly to state and municipal governments. Even recognizing that the interest of a state government in overseeing a local election is slightly different than the interests involved in overseeing a national election, an examination of the existing state requirements for ballot access suggests that several of the present state systems violate the edicts announced in *Williams*.[40] Moreover, the *Wil-*

3501.38(E) of the *Ohio Revised Code* provides that "[e]very petition paper shall bear the affidavit of the circulator that he witnessed the affixing of *every signature* . . . ." (emphasis added). For a recent decision voiding signatures on a petition for noncompliance with the statute, see State *ex rel.* Stillo v. Gwin, 18 Ohio St. 2d 66 (1969).

38 ALA. CODE tit. 17, § 145(3) (Cum. Supp. 1968); ALASKA STAT. § 15.25.106 (1962); IDAHO CODE ANN. § 34-612(c) (Cum. Supp. 1967); KAN. STAT. ANN. § 25-302(a) (1968); N.C. GEN. STAT. § 163-122(1) (Cum. Supp. 1967); N.D. CENT. CODE § 16-04-20(4) (Cum. Supp. 1967); UTAH CODE ANN. § 20-3-38 (1969).

39 *See* note 25 *supra* and accompanying text.

40 Arkansas and North Carolina are highly questionable because of the large number of signatures required. The requirement of Maryland and North Carolina, that the circulator of the petition must witness every signature, is clearly suspect in light of the large number of signatures required. Moreover, the requirement of the Michigan law that no more than 35 percent of the required signatures come from any one county may be ripe for challenging since Wayne County, the largest in the state, is approaching a size equivalent to the 35 percent figure. Finally, several states require early filing dates;